Supreme Court, U.S.
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No. 01-1728

In the Supreme Court of the United States

ELLETT BROTHERS, INC.,
Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC., ST. PAUL MERCURY INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Ellett Brothers, Inc. ("Ellett Brothers"), a distributor of handguns, is a defendant in four lawsuits that seek to change the manner in which Ellett Brothers markets, sells and distributes handguns (the "Underlying Lawsuits"). Ellett Brothers tendered each of the four Underlying Lawsuits to its general liability insurers, including United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Underwriters, Inc., and St. Paul Mercury Insurance Company (collectively "St. Paul"), seeking a defense and indemnification. The District Court for the District of South Carolina held that there was no duty to defend any of the Underlying Lawsuits because none of those suits sought "damages" as required by the material contracts for liability insurance. The Fourth Circuit affirmed.

The Petition raises the following issue:

> Did the Court of Appeals for the Fourth Circuit reversibly err in concluding that, under South Carolina law, sums paid by an insured to prevent future injuries are not "damages" under contracts for general liability insurance.

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RESPONDENTS UNITED STATES FIDELITY AND GUARANTY COMPANY, FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC., AND ST. PAUL MERCURY INSURANCE COMPANY'S BRIEF IN OPPOSITION TO ELLETT BROTHERS, INC.'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Ellett Brothers commenced this action against St. Paul and others, seeking a declaration that, pursuant to certain contracts for liability insurance, St. Paul is obligated to defend and indemnify Ellett Brothers with respect to four Underlying Lawsuits. [Petition p. 2]. The first three lawsuits (the "Municipal Complaints") have been consolidated and are pending in California state court. The fourth lawsuit, commenced by the NAACP, is pending in New York federal district court.

The district court awarded summary judgment in favor of St. Paul, finding that St. Paul was not obligated to defend Ellett Brothers in any of the Underlying Lawsuits because, under South Carolina law, contracts of general liability insurance do not cover claims for equitable relief aimed at preventing future injuries. [Pet'r App. pp. 20a – 24a]. The United States Court of Appeals for the Fourth Circuit affirmed that judgment, finding that under South Carolina law, the relief sought by the California municipalities and the NAACP does not constitute covered "damages," but rather, amounts only to equitable and prophylactic relief beyond the scope of Ellett Brothers' insurance. [Pet'r App. pp. 4a – 16a].

I. THE UNDERLYING LAWSUITS.

A. The Municipal Complaints.

The City of San Francisco, the City of Los Angeles, and the County of Los Angeles, commenced three lawsuits against Ellett Brothers and other gun manufacturers and distributors (the "Gun Industry Defendants"). These Municipal Complaints are based on substantially similar allegations. The Municipal Complaints allege that Ellett Brothers and other Gun Industry Defendants employ a distribution system designed to facilitate the acquisition of handguns by criminals, minors and others not authorized or intended to use, sell, or possess handguns.

The Municipal Complaints in general contain three causes of action. First, they allege that Ellett Brothers and the other Gun Industry Defendants' conduct created a continuing public nuisance. The Municipal Complaints each seek an abatement of the conduct that allegedly created and perpetuates this nuisance. The Municipal Complaints also contend that Ellett Brothers and other Gun Industry Defendants violated the California Business and Professions Code and unlawfully created and maintain public and private nuisances. Finally, the complaints by the County of Los Angeles and the City of San Francisco also contend that Ellett Brothers and other Gun Industry Defendants violated the California Business and Professions Code in connection with the marketing and sale of firearms. The municipalities do not seek any compensatory relief for these claims.

B. The NAACP Complaint.

Like the Municipal Complaints, the NAACP Complaint alleges that Ellett Brothers and other Gun Industry

Defendants created and maintain an allegedly illegal secondary market for guns. The NAACP Complaint requests injunctive relief, in the form of an order directing that each Gun Industry Defendant establish, implement, and enforce various mandatory safety measures. The only monetary demand in the NAACP lawsuit is a request for an order requiring the Gun Industry Defendants to institute and contribute to a fund for the education, supervision, and regulation of approximately 16,000 gun dealers. The NAACP does not seek compensatory relief. In fact, paragraph 63 of the NAACP Complaint explicitly states that it is not requesting legal damages.

II. THE CONTRACTS FOR INSURANCE.

At issue are fourteen contracts between Ellett Brothers and St. Paul for commercial general liability insurance, commercial umbrella liability insurance, and/or excess umbrella liability insurance (the "St. Paul Contracts"). The St. Paul Contracts state that St. Paul will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which the insurance applies" and provide that St. Paul will have the "right and duty to defend the insured against any 'suit' seeking those damages." [Petition p. 2]. The Contracts further provide, however, that "[n]o other liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B." The St. Paul Contracts define "bodily injury" to mean "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." The St. Paul Contracts define "property damage" as " a. [p]hysical injury to tangible property . . . or . . . b. [l]oss of use of tangible property that is not physically injured."

The St. Paul Contracts also provide coverage for certain other amounts that Ellett Brothers might become obligated to pay. These other amounts are set forth expressly in the Contracts' Supplementary Payments provision. The Supplementary Payments provision provides coverage, "with respect to any claim or 'suit' we defend," for prejudgment and post-judgment interest, and costs and attorneys fees.

Likewise, the St. Paul Contracts provide coverage for personal injuries and advertising injuries as well as for medical payments. Those coverages, however, are not at issue in this appeal and no other coverage is afforded under the Contracts.

III. THE CLAIM FOR COVERAGE.

Facing the potential for a significant increase in business and operating costs in the event that the underlying plaintiffs prevail, Ellett Brothers tendered the Underlying Lawsuits to St. Paul and certain other general liability insurers seeking a defense and indemnification in each of those lawsuits. Coverage was denied because the Underlying Lawsuits seek only equitable and prophylactic relief, not "damages." Ellett Brothers then filed this lawsuit to determine the parties' respective rights and obligations under the applicable insurance contracts. Thereafter, Ellett Brothers moved the district court to certify to the South Carolina Supreme Court the question of whether the claims asserted in the four Underlying Lawsuits constitute claims for "damages" under the insurance contracts. On October 25, 2000, the district court denied that motion because the "damages" issue under South Carolina law was settled. [Pet'r App. pp. 25a – 26a]. Ellett Brothers then moved to dismiss its own claim for indemnification against St. Paul and Ellett Brothers' other insurers. The district court permitted both dismissals.

Thereafter, the district court awarded summary judgment in favor of St. Paul, finding that St. Paul was not obligated to defend Ellett Brothers in any of the Underlying Lawsuits because, under South Carolina law, contracts of general liability insurance do not cover claims for equitable relief aimed at preventing future injuries. [Pet'r App. pp. 20a – 24a]. That finding necessarily resolved all substantive issues remaining in the case.

The Fourth Circuit affirmed the judgment of the district court, finding that under South Carolina law, the relief sought by the California municipalities and the NAACP does not constitute covered "damages," but rather, amounts only to equitable and prophylactic relief beyond the scope of Ellett Brothers' insurance. [Pet'r App. pp. 4a – 16a]. Ellett Brothers petitioned for rehearing and rehearing *en banc*. Both petitions were denied. [Pet'r App. pp. 1a – 3a].

REASONS FOR DENYING CERTIORARI

Ellett Brothers contends that the Fourth Circuit failed to properly analyze and apply South Carolina law in light of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Ellett Brothers further contends that the Fourth Circuit ignored South Carolina law and instead created out of whole cloth a "default rule" of federal common law.[1] Ellett Brothers misreads the Fourth Circuit's opinion. A proper reading of

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[1] Ellett Brothers' reference to a "default rule" is a reference to the Fourth Circuit's statement in *Ellett* that, absent evidence of the parties' intent to expand the definition of "damages" in a contract for general liability insurance to include amounts paid in equity, the Court will construe the term "damages," in accordance with South Carolina law, to mean legal damages only. *See Ellett Brothers, Inc. v. United States Fidelity & Guaranty Company*, 275 F.3d 384 (4th Cir. 2001).

that opinion illustrates that the Fourth Circuit appropriately applied South Carolina law as required by *Erie*. Certiorari, therefore, should be denied.

I. THERE IS NO FEDERAL QUESTION OR CONSTITUTIONAL ISSUE.

The only question raised by Ellett Brothers is one of state law. There is no federal question. There likewise is no constitutional issue, as Ellett Brothers concedes. [Petition p. 1]. This Court, therefore, only should exercise review if it finds that the Fourth Circuit misapplied the prevailing law of South Carolina. Sup. Ct. R. 10. There has been no such misapplication. Review, therefore, is not warranted.

II. NEITHER THE DISTRICT COURT NOR THE FOURTH CIRCUIT VIOLATED *ERIE*.

The Fourth Circuit's opinion in *Ellett* is consistent with and compelled by every known material decision under South Carolina law. Ellett Brothers, therefore, has not presented a compelling reason for this Court to exercise discretionary jurisdiction over this appeal.

A. The Fourth Circuit Applied State Substantive Law, Not Federal Common Law.

There is no misapplication of state law or violation of the federal court's duties and responsibilities under *Erie*. Ellett Brothers erroneously contends that the Fourth Circuit violated *Erie's* prohibition against the creation of federal common law. The Fourth Circuit in no way violated this rule. The Fourth Circuit followed what is self-evident upon a reading of relevant South Carolina case law – that South

Carolina's own courts have developed a body of state substantive law from which a "default rule" of contract interpretation can be gleaned.

The "default rule" cited by the Fourth Circuit in *Ellett* is nothing more than an expression of the present state of South Carolina law on the "damages" issue. A review of South Carolina decisions on that issue confirms this. Ellett Brothers' characterization of the rule applied in *Ellett* as a rule of federal common law is just wrong.

1. Braswell Establishes The "Default Rule" Expressed In Ellett.

For more than twelve years, courts of South Carolina have held that amounts paid by an insured that go to prevent future injuries, as opposed to compensating for actual injuries, do not constitute "damages" under contracts for liability insurance. Indeed, this is exactly what the South Carolina Court of Appeals held in *Braswell v. Faircloth*, 387 S.E.2d 707 (S.C. Ct. App. 1989), where the court distinguished amounts that the insured would pay to remediate damaged soil from amounts that the insured would pay to prevent the

contamination of other soil. *See Braswell*, 387 S.E.2d at 711.[2]

In *Braswell*, the South Carolina Court of Appeals affirmed a trial court's finding that monies spent to prevent future injuries or harm do not constitute "damages" under South Carolina law because "damages" are amounts paid as a result of actual injury or damage. *Braswell*, 387 S.E.2d at 710. In *Braswell*, the policyholder sought coverage for two things: (1) the cost of removing drums of chemicals to prevent them from spilling; and (2) the cost of cleaning up chemicals that already had spilled. *Id.* Coverage was afforded only for the costs associated with the latter. *Id.* at 711. No coverage was afforded for amounts necessary to prevent damage that had *not yet* occurred. *Id.* The *Braswell* court explained:

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[2] *Braswell* is controlling authority on the "damages" issue under South Carolina law. Although *Braswell* is a decision from an intermediate appellate court, *Braswell* is precedential authority because the "damages" issue has not been addressed by South Carolina's highest court. Without a decision from the state's highest court, federal courts must abide by the decisions of intermediate state appellate courts barring convincing evidence to the contrary. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 526 n.3 (1972) (noting that federal courts must follow holdings of state intermediate appellate courts); *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940) (affirming earlier holding that federal courts "must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently."); *Six Cos. of Cal. v. Joint Highway Dist. No. 13*, 311 U.S. 180, 188 (1940) (state law by an intermediate appellate state court must be accepted by federal courts in absence of convincing evidence that the law of the state is otherwise). There is no evidence to the contrary and, in fact, all other known material decisions from courts of South Carolina support *Braswell*. Moreover, Ellett Brothers concedes that *Braswell* is binding authority. [*See* Petition p. 22].

> The major portion of the judgment constituted costs for removal of stored waste. These stored wastes had not leaked. . . . These removal costs are preventative in nature. No damages have yet occurred. We agree with the trial court that these costs are not covered under a general comprehensive liability policy.

Id. at 710.

Ellett Brothers ignores this critical distinction. Indeed, the *unedited* relevant language from *Braswell*, which is quoted by Ellett Brothers only in piecemeal form [*see* Petition p. 21], plainly illustrates the distinction:

> Upon the facts of this case we find an occurrence causing property damage did result *but only* as to the spill of the 1000 gallons of chemicals and only as to the $6643.72 in damages directly related to the contamination of the land by this spill. *The other costs constituting the federal court judgment are not covered under the insurance policy.*

Id. at 711 (emphasis added.) Thus, of the more than $187,000.00 at issue in *Braswell*, the court found that only $6,643.72 actually constituted "damages" covered by general liability insurance. The remainder of the judgment was preventative and, thus, not covered.

The distinction recognized in *Braswell* is critical because it sets forth the basis for the rule enunciated by the Fourth Circuit in *Ellett*, that amounts paid to prevent future injuries are not "damages." Contrary to Ellett Brothers' contention, the district court's and the Fourth Circuit's

reliance upon *Cincinnati Ins. Co. v. Milliken*, 857 F.2d 979 (4th Cir. 1988) as the basis for that rule was fully consistent with South Carolina law, because the court in *Braswell* expressly confirmed that *Milliken* is a correct statement of South Carolina law with respect to amounts that are spent to prevent future injury. *See Braswell*, 387 S.E.2d at 711. Moreover, whether the Fourth Circuit erred in deciding *Milliken* (which it did not) is of no moment now, since that decision has since been ratified by *Braswell* as a correct prediction of South Carolina law. *Id.*

Braswell confirms, therefore, that costs that are preventative in nature are not "damages" in the context of general liability insurance under South Carolina law. *Braswell* further confirms and clarifies that the *Milliken* Court correctly predicted how South Carolina courts would view the distinction between amounts that compensate for past injury – "damages" – and amounts paid to prevent future injuries that have not happened, and may never happen. *Id.* at 711.[3]

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[3] Concurring with the Fourth Circuit majority in *Ellett v. U.S. Fidelity & Guar. Co.*, Judge Michael recognized *Braswell's* clarification. As Judge Michael explained it, the issue under South Carolina law is not whether the underlying relief is labeled as legal or equitable, but whether the purpose of the relief is to compensate for past injuries. *Ellett*, 275 F.3d at 391 (Michael, J., concurring). Where the purpose is compensation for an actual injury, the relief may be covered; where it is to prevent future injury, it is not. *Id.* The distinction, however, between Judge Michael's view and the majority's view is a distinction without a difference in this case because, here, there is no coverage for the Underlying Lawsuits under either view. The Underlying Lawsuits do not seek legal "damages." They likewise do not seek compensation for past injuries. Either way, the lawsuits are not covered.

2. *Other Decisions Under South Carolina Law Further Confirm That The "Default Rule" In Ellett Is A Rule Of State Substantive Law.*

Braswell is not the only decision under South Carolina law that recognizes a distinction between legal "damages" and other amounts that an insured might become obligated to pay. Indeed, while *Braswell* may be the only reported decision from a South Carolina state court to address the "damages" issue under South Carolina law, two unreported decisions also provide resolute guidance as to how South Carolina courts interpret the term "damages" in the context of general liability insurance.

In *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, No. 96-CP-03-43 (S.C. Ct. Common Pleas, Allendale County, March 28, 2001) [Resp. App.1, p.1b], the Court reiterated that South Carolina law continues to distinguish, for purposes of general liability insurance coverage, amounts paid by a policyholder as compensation for an injury and amounts paid for some other purpose. In *Helena Chemical*, the court held that amounts spent by the policyholder to remediate a public harm were not "damages" covered under the policyholder's general liability insurance contract. *Helena Chemical*, slip op. at 8. The court reasoned that the unambiguous language of Helena's general liability insurance policies plainly illustrates that coverage is not available for every cost or expense that Helena might incur. *Id.* Rather, the obligation must be one to pay "damages" to a third party because of injury to that party. *Id.* Amounts paid by Helena because of the manner in which it ran its business do not satisfy those criteria. *Id.* The *Helena Chemical* court explained:

> The "as damages" or "for damages" language is consistent with the basic nature of these insurance policies. These policies are liability policies. They do *not* cover every cost or expense that a company may have to pay because the company must comply with the law. Businesses must absorb many such expenses on a daily basis during the course of operations. Rather, these policies cover liabilities for *damages* to third parties or to third-party property.
>
> There is a plain, ordinary and popular meaning to the term "damages." People understand that when a person pays "damages," they are paying them to another person on account of legal liability for harm to that person or their property.

Id. at 8-9 (emphasis in original).

In another unreported decision, the South Carolina Court of Common Pleas, Beaufort County, reached a similar conclusion finding that response costs under CERCLA were equitable in nature and, thus, not "damages." *Scheper v. United States Fidelity and Guaranty Co.*, No. 90-CP-07-879 (S.C. Ct. Common Pleas, Beaufort County, October 29, 1991). [Resp. App. 2, p.26b]. In *Scheper,* the Court awarded summary judgment to the insurer, finding that claims asserted against the policyholder for reimbursement of environmental response costs are not claims for "damages." *Scheper*, slip op. at 8. The court reasoned that, under South Carolina law, environmental response costs are equitable amounts, and thus not "damages" under a contract for general liability insurance. *Id.* In reaching that conclusion, the South

Carolina court cited with approval the Fourth Circuit's decision in *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), which was followed by *Milliken* and which held that a claim for environmental response costs was one for injunctive and other equitable relief, not for damages. *Id.* at 9. The *Scheper* court likewise approved of *Milliken, supra,* and *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986) (also holding that amounts paid in equity are not "damages"). *Id.*

Moreover, the *Scheper* decision expressly rejected decisions from other jurisdictions that fail to recognize the distinction between claims for damages and claims for other forms of relief – including, for example, *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 388 S.E.2d 557 (N.C. 1990), which is relied upon by Ellett Brothers in its Petition. [*See* Petition pp. 16, 19]. As *Scheper* explains, *Spangler* and much of the other foreign authority relied upon by Ellett Brothers is immaterial because South Carolina law on the "damages" issue is settled:

> This court is aware of decisions to the contrary. See, *e.g.*, *Spangler Const. v. Indus. Crankshaft*, 388 S.E.2d 557 (N.C. 1990). However, in South Carolina, the unambiguous term "damages" in the USF&G policies does not encompass coverage for response costs asserted by EPA in its claim against Plaintiffs. Therefore, USF&G has no obligation to defend or indemnify Plaintiffs in connection with the underlying claims in this case. Accordingly, the first basis of my decision granting summary judgment is that USF&G has neither coverage nor a duty to defend because cleanup costs incurred pursuant to CERCLA do not

> constitute covered "damages" under the policies at issue.

Id. at 11-12.

In sum, *Braswell, Helena Chemical*, and *Scheper* all demonstrate that, under South Carolina law, the term "damages," without more, does not include equitable or prophylactic relief. The federal "default rule" championed by Ellett Brothers, therefore, is a false characterization of South Carolina common law. The Fourth Circuit was correct. *Erie* has not been violated. No further review is required.

CONCLUSION

The Fourth Circuit correctly concluded that there is no coverage for the Underlying Lawsuits because they seek only equitable relief aimed at the prevention of future injuries. They do not seek "damages." Ellett Brothers' Petition, therefore, should be denied.

Respectfully submitted,

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APPENDIX 1

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No. 96-CP-03-43

STATE OF SOUTH CAROLINA
COUNTY OF ALLENDALE

HELENA CHEMICAL COMPANY,	)
	)
Plaintiff,	)
	)
v.	)
	)
ALLIANZ UNDERWRITERS	)
INSURANCE COMPANY, et al.	)
Defendants.	)
	)

ORDER GRANTING
SUMMARY JUDGMENT

This is an insurance coverage dispute arising out of pesticide contamination at three South Carolina pesticide facilities. The plaintiff is Helena Chemical Company ("Helena"), a pesticide seller and formulator. It is a named insured or additional insured under certain insurance policies

issued by the various defendant insurance carriers.[1] Helena seeks in this action to recover its own costs and expenses incurred primarily by hauling away and disposing of soil, contaminated with pesticide residues and chemicals, found on or immediately adjacent to its property. The defendant insurance companies have filed motions asking this Court to grant summary judgment on the following grounds:

1) That Defendants do not have a duty to defend Helena or to reimburse Helena for its out-of-pocket costs in cleaning up the contamination on and alongside its properties because Helena's costs of cleaning up the property are not sums that policyholder is legally obligated to pay "as damages," and therefore are not covered by these insurance policies;

2) That Defendants do not have a duty to indemnify or defend Helena because the policies exclude coverage for the pollution at issue;

3) That as to the Fairfax facility, Defendants do not have a duty to indemnify or defend Helena because Helena failed to provide them with timely notice regarding pollution problems at that site;

---

[1] Those companies are Insurance Company of North America (INA), ACE Property & Casualty Insurance Company (formerly CIGNA Property & Casualty Insurance Company, formerly known as Aetna Insurance Company) (ACE P&C), Central National Insurance Company of Omaha (as to certain policies issued through Cravens, Dargan, Pacific Coast, managing general agent) (Central National), and Company, Lexington Insurance Company, and Allianz Underwriters.

4) That Helena cannot maintain a claim for coverage against its excess level carriers because the excess policies' minimum attachment points cannot be reached given the costs that would be allocated to each year as required by *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 236, 486 S.E.2d 89, 91 (S.C. 1997) and *Spartan Petroleum Co. v. Fed. Mut. Ins.*, 162 F.3d 805, 811 (4th Cir. 1998);

5) That Defendants were not required to provide a defense to Helena because in connection with the cleanups at issue, there were no suits filed against Helena triggering an obligation to defend;

6) That Helena's bad faith claims must be dismissed because each of the Defendants had one or more reasonable bases for believing that they did not owe Helena coverage for its cleanup claims.

The parties have submitted lengthy briefs, supporting affidavits, deposition testimony and documents addressed to these motions. The Court heard extensive argument on the motions at a hearing on February 20, 2001.

Summary judgment is appropriate where the pleadings and tendered evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. In determining whether the party opposing summary judgment has raised a triable issue of fact, the evidence should be viewed in the light most favorable to the nonmoving party. For the reasons set forth below, the Court finds that considering the evidence in the light most favorable to Helena, Helena has raised no triable issue and the Defendants are entitled to summary judgment on the first two motions,

which address the "as damages" language and the pollution exclusion. The issues raised by those motions are dispositive of the case, including the "bad faith" claim. Therefore, the Court finds it unnecessary to decide the Defendants' remaining summary judgment motions (3, 4, & 5 listed above).

FACTS

I. THE INSURANCE POLICIES

Helena Chemical Company is in the business of, among other things, formulating, packaging and selling pesticides. Helena is a named insured and additional insured under certain liability policies issued by Defendants, generally for one year periods, in the 1970s and 1980s. Some of these policies were first-layer primary policies; in many years, Helena or its parent company also had excess policies that sit in various layers above the primary policies.

The policies at issue are liability policies, as distinguished, for example, from first-party property damage policies, business risk policies or other kinds of policies that might specifically provide coverage for damages or costs incurred in connection with damages to one's own property. All of the policies at issue in this case contain the same general coverage description, requiring the insurance companies to reimburse only those sums that the policyholder owes or has paid "as damages." Specifically, each insurance policy specifies that the carrier will pay on behalf of the insured (or reimburse) those sums that the insured is legally obligated to pay *as damages* because of property damage.

The insuring agreement of several of the primary policies state that the carrier will:

> pay on behalf of the Insured all sums which Insured *shall become legally obligated to pay as damages* because of . . . property damage . . . to which this insurance applies, caused by an occurrence. . .

The insuring agreement of certain of excess policies states the matter similarly, specifying that the carrier agrees to pay:

> all sums which the Insured *shall be obligated to pay by reason of liability . . . for damages* . . . on account of property damage . . .

All of the policies also contain a provision expressly excluding coverage for pollution. Most of the policies state, with some minor variation, that they do not apply:

> to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkaloids, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, release or escape is sudden and accidental.

Other policies, such as the London Market excess policies (and those that follow form to those policies), state that there is no coverage for personal injury, bodily injury or property damage caused by "seepage, pollution or contamination" unless that "seepage, pollution or contamination is caused by

a sudden, unintended and unexpected happening during the period of [the policy.]" These pollution exclusions, therefore, eliminate coverage for pollution unless the pollution falls within the exception to that general exclusion.

II. THE CONTAMINATION AND CLEANUP FOR WHICH HELENA SEEKS TO RECOVER ITS EXPENSES

Helena has operated at least three pesticide formulation and sales facilities in South Carolina – in Fairfax, Cameron, and Mayesville. Pesticide dust and liquid and related chemicals were ultimately found on and immediately adjacent to the sites. After contamination with the United States Environmental Protection Agency ("EPA") or the South Carolina Department of Health and Environmental Control ("DHEC"), Helena incurred costs cleaning up such contamination, primarily by arranging for the soil from the sites to be hauled away and disposed of at appropriate facilities. In this action, Helena seeks to recover from its liability insurers its out-of-pocket costs for that clean-up – an amount somewhat in excess of ten million dollars.

A. The Fairfax Site

The Fairfax site is located on 13.5 acres near Highway 321 South in Fairfax, South Carolina. Pesticide information began in approximately 1956 when Mitchell Insecticide moved its pesticide formulation operations to the site, including grinding and bagging the pesticides. The company formulated about 5 million pounds of dry pesticides per year until the company was sold to new owners in approximately 1962. Mitchell Insecticide continued formulating dry pesticides and expanded the facilities to formulate liquid pesticides. In approximately 1965, Blue Chemical Company

bought the business and continued its operations as its own business, formulating both dry and liquid pesticides. In approximately 1970, Helena formally merged with Blue Chemical Company. After the merger, Mr. Blue, a former principal of Blue Chemical, became an officer of Helena. Helena continued manufacturing pesticides at the site until 1978. Helena currently operates the facility as a retail sales outlet and warehouse for agricultural chemicals.

Environmental authorities of both the State of South Carolina, DHEC, and EPA began investigating the contamination at the site in the early 1980s. The record evidence shows that contaminated soil at the Fairfax site was found where routine loading and unloading of chemicals, pesticide formulation and waste disposal (*i.e.*, landfilling) took place. The Final Remedial Investigation Report prepared by Helena's environmental consultant, Environmental and Safety Designs, Inc., and submitted to the EPA, states that:

> Pesticide distribution in soils is strongly focused north and northwest of the liquid formulation building, a large building that was used for the formulation of liquid pesticides by the former operators. The formulation of liquid pesticides generates liquid wastes in the form of "washouts" of mixing vessels between chemical formulations. While current industry practice is to containerize these washouts for reuse, it is unlikely that this was done in the 1960s and early 1970s . . . Contamination distribution on the Site, both in soil and groundwater, strongly suggest [sic] the pipe discharge and direct discharges from the liquid formulation building.

Id. At page 6-1 (footnote omitted). A second site of pesticide contaminants was an area used as a landfill, a disposal location, at the site. *See id.* at page 6-2. Finally, the report states that a third source of the pesticides on the ground, closely related to the warehouse structures, was "fugitive emissions and losses associated with handling dry pesticides." *Id.*

Over a number of years, Helena communicated with DHEC and EPA about the pesticide contamination at the Fairfax site. In 1985, EPA began considering placing the site on the National Priorities List. EPA informed Helena in 1989 that it considered Helena to be responsible for contamination at the site under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), P.L. 99-499. As a result of DHEC and EPA involvement, Helena undertook to remove and dispose of the pesticide-contaminated soil at the site.

The total cost of these soil removal efforts at the site was approximately $9 million, most of which was for hauling away the contaminated soil from Helena's property for disposal, although the disposal also involved some soil along the boundary and in a bordering drainage ditch. In connection with the possibility of contaminated groundwater in a shallow aquifer under the property, Helena also began a "pump and treat" operation with associated costs of approximately $378,062. Finally, Helena paid the government $50,000 to obtain a "credit" for the replacement of wetlands in lieu of cleaning up wetlands found to be contaminated on and adjacent to its site. (Under certain circumstances, rather than clean up a wetland area, the

company can pay money toward purchase of replacement wetlands elsewhere).

Helena seeks to recover all these costs under the Defendants' insurance policies.[2]

B. The Cameron Site

The Cameron facility is located on U.S. 176 in Cameron, Calhoun County. It operated as an agricultural chemical formulation and distribution facility from the time it was built in approximately 1969 until the late 1970s. Raw materials were transported to the site by truck and rail. The record evidence shows that contaminated soil was ultimately found around the facility's formulation, storage, and loading/unloading areas.

DHEC informed Helena in 1994 that it considered Helena to be responsible under CERCLA for contamination at the site. Helena completed a removal and disposal of pesticide-contaminated soils in 1995. Helena spent about $1

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[2] In addition, in connection with this site, Helena added to this case by its Second Amended Complaint a claim for coverage arising from two private lawsuits brought against Helena known as the *Hetrick* and *Barnes* suits. Those suits appear to allege, among other things, that the contamination from Helena's sites damaged the plaintiffs' property. Those suits have not proceeded very far. Because, unlike the clean up cost matters, *Hetrick* and *Barnes* are suits seeking damages, the primary insurance carriers have reimbursed Helena for its defense costs in those cases, subject to a reservation of rights. Those costs have been minimal thus far. At oral argument, Helena advised the Court that proceedings in those cases were effectively stayed until this Court decided these summary judgment motions.

million hauling away soil from this facility. It seeks to recover these costs under the policies.

C. The Mayesville Site

Helena's Mayesville facility is located on Highway 76 East in Sumter County. In 1995, DHEC allegedly found pesticide contamination in a ditch adjacent to the facility and asked Helena to initiate a remediation plan. Helena spent approximately $282,000 at Mayesville, virtually all of it the result of removing contaminated soil from the ditch. It seeks to recover these costs under the policies.

CONCLUSIONS

I. HELENA'S INVESTIGATION AND CLEANUP COSTS ARE NOT "DAMAGES" COVERED BY THE POLICIES

The first issue is whether Helena can recover the out-of-pocket expenses that it incurred in investigating and cleaning up the pesticide contamination on and around its property. In view of the plan and clear language of the insurance policies, the Court holds that it cannot.

As noted above, the insuring clause of the policies defines what the carriers are responsible to pay. It specifies that the carrier will pay those sums which the policyholder is, *inter alia*, obligated to pay "as damages" or "for damages" because of property damage covered by the policies.

The plain language of the insurance policies states that reimbursement is not available for every cost or expense of the policyholder, or even for every obligation for which a policyholder may be legally obligated "to pay" money. To

the contrary, coverage is available only for money that Helena is "legally obligated" to pay "as damages" or "for damages" on account of property damage. The "as damages" or "for damages" language is consistent with the basic nature of these insurance policies. These policies are liability policies. The do *not* cover every cost or expense that a company may have to pay because the company must comply with the law. Businesses must absorb many such expenses on a daily basis during the course of operations. Rather, these policies cover liabilities for *damages* to third parties or to third-party property.

There is a plain, ordinary and popular meaning to the term "damages." People understand that when a person pays "damages," they are paying them to another person on account of legal liability for harm to that person or their property. By way of illustration, the two private party lawsuits discussed above, brought by nearby landowners seeking money for alleged damage to their property, are lawsuits that could give rise to Helena owing money "as damages" or "for damages."

Conversely, people would *not* ordinarily understand that expenditures made by a business to take steps to comply with government health, safety or environmental regulations or directives, including the costs of cleaning up the pollution at one's own facilities, are "damages." Rather, people would understand such costs and expenses as the expense of doing business in a civilized society. People would not understand that a company that has to pay such costs to comply with government requirements is paying itself "damages." Those out-of-pocket costs simply are not paid as damages in response to some liability. This Court is bound to respect the plain, ordinary and popular meaning of the term "damages"

and to give the words of the insurance policy their proper meaning.

Helena argues that it spent money at the three sites because of a legal obligation. Helena argues that if it failed to comply with the government directives, it could have been liable for statutory penalties, including punitive damages, or that EPA would have cleaned up the sites itself. Helena argues that, as a result, its costs to clean up the site should be covered under the policies. The Court finds Helena's argument unpersuasive.

Government rules and regulations that require a landowner to perform some duty or to undertake such action may be costly. Moreover, if a company fails to do its duty it may have to pay penalties or be subject to other enforcement mechanisms. But that does not make the cost of complying with such requirements "damages." Where a company must clear its property of contaminants to meet government requirements, or to prevent contamination to others, it will necessarily incur costs. But whether the landowner cleans up its property as it goes along, or whether it waits for the government to tell it to do so, the out-of-pocket costs of complying with such a government mandate to clean up one's pollution are *not* "damages."[3] Helena cannot recover its out-

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[3] The cases note that where the responsible party fails to comply with a cleanup direction, the EPA may step in and conduct the cleanup itself – and then obtain reimbursement from the responsible party. The cases finding that cleanup costs – known as response costs – are not "damages" do not distinguish between the direct cleanup costs and reimbursement of EPA, where EPA steps in. *Company Cincinnati Ins. Co. v. Milliken*, 857 F.2d 979 (4th Cir. 1988) (monies to be paid to reimburse government for its costs performing CERCLA cleanup are not "damages") and *Scheper v.*

of-pocket costs from its insurers under these policies. In fact, the concept of paying "damages" to oneself is anomalous.

These conclusions are consistent with South Carolina case law. The Court finds the reasoning of the *Scheper* case, decided in 1991, persuasive. *Scheper v. United States Fid. & Guar. Co.*, No. 90-CP-07-879 (C.C.P. Beaufort Cty., Nov. 1, 1991). In *Scheper*, the court declined to allow a manufacturer whose property had been placed on the National Priorities List to recover the costs of an EPA cleanup under insurance policies similar to these. The court held that the costs of the government-imposed cleanup actions, whether conducted by the government or by the policyholder, are *not* "damages" covered by the insurance policies.

The court in *Scheper* explained that the "insurer did not agree to pay "*all* sums which the insured shall become legally obligated to pay, but rather 'all sums which the insured shall become legally obligated to pay *as damages*.'" If the term "damages" were to be given "broad boundless connotations . . . then the term 'damages' in the contract . . . would become mere surplusage because any obligation to pay would be covered.'" *Id.* at 9 (citation omitted). Instead, the court ruled, "in South Carolina, the unambiguous term 'damages' . . . does not encompass coverage for response

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United States Fid. & Guar. Co, No. 90-CP-07-879 (C.C.P. Beaufort Cty., Nov. 1, 1991) (same) with *Sangama Weston, Inc. v. National Surety Corp.*, No. 6:89-642-21 (D.S.C. Oct. 28, 1992) (insured's out-of-pocket expenses to meet government cleanup demands are not "damages") and *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990) (same). The basic legal obligation in both cases is first upon the responsible party to clean up the pollution, which is not a situation that involves covered damages.

costs asserted by EPA in its claim against the Plaintiffs." *Id.* at 11-12. As a result, the carrier had no duty to indemnify or defend the policyholder. *Id.*

In its order granting summary judgment to the insurance carrier, the court in *Scheper* cited the reasoning of the United States Court of Appeals for the Fourth Circuit in two cases where it considered whether cleanup costs were covered by the "as damages" provision. In *Cincinnati Ins. Co. v. Milliken*, the federal court applied South Carolina law to resolve whether CERCLA cleanup costs are covered under a comprehensive general liability policy, and found that "[i]n the insurance context the word 'damages' is not ambiguous. It means legal damages." 857 F.2d 979, 980 (4th Cir. 1988). In *Maryland Casualty Co. v. Armco*, 822 F.2d 1348 (4th Cir. 1987), the federal court emphasized that coverage is provided only for liability "as damages" on account of property damage. Cleanup efforts, required by the government or even undertaken by the government, are not "damages" legally payable to a specific person or persons. 822 F.2d at 1353-54.

In *Braswell v. Faircloth,* 387 S.E.2d 707 (S.C. Ct. App. 1989), the South Carolina Court of Appeals expressly followed the reasoning of the Fourth Circuit in *Milliken* and *Armco*. In *Braswell,* the policyholder was the *lessee* of certain property. The lessor sued the lessee seeking costs it had incurred in cleaning up its property at the government's direction. The Court of Appeals held that the property owner/lessor had suffered damages from property damage, in the amount of $6,643 in out-of-pocket expenses, which it sought to recover as damages from the lessee. Accordingly, the Court of Appeals allowed the *lessee* to recover those damages paid to the lessor under its insurance policy.

But the court went on to hold that the bulk of the cost incurred, primarily to avoid future damage to the property by removing various storage tanks from the site, was *not* damages from property damage, 387 S.E.2d at 719-11. The court noted that the "costs of complying with a government directive" to clean up one's property are simply not recoverable under an insurance policy that provides coverage for sums that the policyholder must pay "as damages." *Id.*

In reaching its conclusion, the Court of Appeals in *Braswell* explicitly recited and adopted the persuasive authority and reasoning of the Fourth Circuit in *Milliken*. The Court of Appeals noted that in *Armco* an "insurer was not obligated to defend or indemnify its policyholder under a comprehensive general liability policy where the underlying action was a suit by the federal government to seek compliance with the directives of regulatory agencies." 387 S.E.2d at 711. The Court of Appeals also explained that in *Milliken* "an insurer was not obligated to defend or indemnify its policyholder in a suit by the federal government to recover the response costs of removing hazardous wastes." 387 S.E.2d at 711. The Court of Appeals then specifically applied the principles described in those cases, denying the policyholder's request to recover certain costs based on the "authority of *Armco* and *Milliken*." *Id.*

Helena argues that *Braswell* actually supports its recovery in this case because the Court of Appeals did allow the policyholder - the lessee - to recover $6,643 from its insurance carrier. Helena has misread that case. The limited claim that the Court of Appeals found reimbursable in *Braswell* was an example of a typical third-party damages claim. Specifically, because the lessee had damaged the lessor's property, the lessor could sue the lessee and claim as *damages* the cleanup costs that the lessee had caused it to

incur. The amount that the lessee was obligated to pay the lessor as damages for property damage was recoverable by the lessee from *its* insurer. In other words, the Court of Appeals found an ordinary damages claim to be reimbursable under the policies. As the South Carolina Court of Appeals made clear, its ruling was an application of, and fully consistent with, the holding and reasoning of *Milliken* and *Armco*.

This Court recognizes the precedential authority of *Braswell* and finds the result in *Braswell* consistent with the plain and popular meaning of the words of the insurance policies. The Court also emphasizes that while it recognizes that *Scheper, Armco* and *Milliken* are not *binding* precedent, the reasoning set forth therein is persuasive. See also *Sangamo Weston Inc. v. National Surety Corp.*, Civ. A. No. 6:89-642-21, at 5-6 (D.S.C. Oct. 28, 1992) (costs to remove "contaminating waste pursuant to a directive of the United States" are not compensable under the third-party liability policies). In the face of this line of cases analyzing the South Carolina law over at least 10 years, and consistently finding cleanup costs are *not* to be "damages" in circumstances like these, Helena has offered no contrary South Carolina authority.[4]

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[4] There are also cases outside of South Carolina supporting the proposition that "damages" as set forth in comprehensive general liability policies do not encompass government ordered cleanup costs. *See, e.g. Patrons Oxford Mut. Inc. Co. v. Marois*, 573 A.2d 16 (Me. 1990). In fact, other jurisdictions have drawn the same distinction made in *Braswell* between the costs of cleanup imposed as a government requirement, which are not recoverable, and the situation presented where one private party sues another to recover cleanup costs as an element of damages. *Compare City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994),

Finally, at oral argument, Helena said that it was possible that there would be additional claims filed against it in the future, including claims by third parties in which those third parties sought damages. If such claims emerge, they presumably would not be barred by the "as damages" provision. Each claim would have to be examined as it arises.

Accordingly, Defendants have neither a duty to indemnify nor a duty to defend Helena because the cleanup costs it incurred as a result of government regulations, directives or requirements are not "damages" recoverable under the policies. Helena's out-of-pocket costs in cleaning up these sites are not "damages" recoverable under these insurance policies. For all of the above reasons, this Court grants Defendants' Motion for Summary Judgment on Helena's Claim for Reimbursement of Cleanup Expenses.

II. THE POLLUTION EXCLUSION BARS COVERAGE FOR HELENA'S CLAIMS

The second issue reached by this Court is whether the pollution exclusions in the insurance policies bar Helena's claims. The Court concludes that they do.

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cert. Denied, 115 S. Ct. 1360 (1995) (cleanup costs are not damages) *with General Casualty Company of Wisconsin v. Hills*, 561 N.W. 2d 718 (Wis. 1997) (private party suit to recover costs from the property holder is a suit for damages). This Court is also aware that courts in other jurisdictions have reached a different conclusion. However, in the Court's view, under South Carolina laws, the term "damages" in the insurance policies at issues is unambiguous an does not encompass coverage for a policyholder's investigation and cleanup costs.

All of the policies at issue contain provisions expressly excluding coverage for pollution unless the discharge, release or escape is sudden and accidental. The London Market excess policies (and those that follow form to those policies), state that there is no coverage for personal injury, bodily injury or property damage caused by "seepage, pollution or contamination" unless that "seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of [the policy]."

This case involves pollution at the three South Carolina sites. Pesticide contamination was found at the three sites where the formulating, loading and unloading of pesticides took place, as well as in a landfill area at the Fairfax site and in drainage ditches adjacent to Helena's properties. This contamination was the subject of the cleanups at issue. The pollution exclusion, therefore, applies unless the claims fall under the exception to the pollution exclusion. In *Greenville County v. Insurance Reserve Fund,* the South Carolina Supreme Court held that the word "sudden" in the pollution exclusion does not mean, abrupt, but does mean "unexpected." 443 S.E.2d 552, 553 (S.C. 1994).

The carriers provided evidence that various operations at the site, in the course of the grinding, formulation and unloading of pesticides, resulted in the discharge of pesticides onto the soil. In contrast, Helena provided no evidence whatsoever of any accidental or unexpected events producing the pollution at issue. In fact, Helena argued that *none* of its employees can recall seeing or hearing about any unexpected, unintended or accidental release of either the liquid pesticides or pesticide dust. The record shows that many current and former Helena employees, and the employees and owners of the predecessor companies, testified specifically that they

have no knowledge of *any* such events at the three facilities. Helena offered no evidence about the cause of the contamination. Instead, Helena would ask the jury to speculate about the cause of the pollution on the site and to conclude, based on conjecture, that the pollution at the site got there from some unidentified accident or unexpected event. In the absence of the tender of any evidence, Helena has, therefore, not met its burden on summary judgment of raising a factual issue on the applicability of the pollution exclusion as defined in *Greenville County*.[5]

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[5] At oral argument, Helena said that the burden should be on the defendants to prove that the exception to the exclusion does not apply. This assertion is incorrect. The burden is on the carriers to show that the exclusion applies in the first instance; they have met that burden because the fact that this case involves pollution is conceded. The burden is then on the policyholder to show that the exception to the pollution exclusion applies. *See e.g., St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1199-1200 (1st Cir. 1994) (. . . "[T]he *insured* bears the burden in establishing that an exception to a pollution exclusion has been satisfied.") (emphasis in original); see also Ostrager & Newman, *Handbook on Insurance Coverage Disputes* (9th ed. 1998) § 10.02(a)(1) and additional cases cited therein (although it is generally the carrier's burden to show the applicability of an exclusion, it is the policyholder's burden to show the applicability of an *exception* to an exclusion, such as the "sudden and accidental" exception).

But even if the burden to produce evidence that the exception does *not* apply properly place was on the carriers, the carriers have met that burden by offering evidence of ordinary, expected releases of small amounts of pesticides as part of the routine operation of the facility. Helena has not introduced any contrary evidence showing that pollution was actually the product of unexpected, accidental events.

Moreover, this Court finds that even if the burden were on the insurance carriers to show that the discharges were *not* unexpected or *not* accidental, the carriers met that burden convincingly. Defendants provided evidence that pesticide contamination resulted from the incidental releases of pesticide during the routine operations of grinding pesticide into dust, loading, unloading, bagging and formulating pesticides. Defendants presented deposition testimony of several witnesses, Charles Hooks, Bobby Pace, James Blue, and William Mitchell, each of whom had significant involvement with the sites at different times throughout their history. Each of these witnesses acknowledged that small quantities of pesticide were discharged in the course of various routine pesticide operations. Mr. Pace testified that pesticides are released into the air in the process of grinding dry pesticides. Mr. Mitchell testified that there was escape during the bagging operations. Mr. Hooks and Mr. Blue testified that liquid pesticide was released onto the ground in small amounts in unloading liquid pesticides.

Defendants' submissions also included a report by Helena's own environmental consultants to EPA describing that some of the pesticide contamination in the soil at the Fairfax site was the product of "fugitive emissions associated with handling dry pesticides," as well as from other facts such as "pipe discharge and direct discharges from the liquid formulation building" and an area used as a landfill at the site. That report also observes in one respect that standards have changed over time so that releases of small amounts of pesticides – washouts – that might have been treated as routine or acceptable in the 1950s, 1960s and 1970s may not be acceptable under modern standards. The sites were in operation for many years. The expectable small releases of pesticides that contaminated the soil are not covered under the pollution exclusion. *E.g. Virginia Properties, Inc. v. Home*

Ins. Co., 74 F.3d 1131, 1134-35 (11th Cir. 1996). In light of the carriers' convincing presentation, Helena's failure to present evidence of an unexpected or accidental release of pollutants highlights that there is no triable issue of fact for a jury on this point.

Helena asserted that it had a policy requiring employees to be careful in handling pesticides. Moreover, Helena insists that if there were spills, its policy would require that they be cleaned up. As a factual matter, the fact that Helena had a general policy of care does not refute the testimony of various Helena officials and employees that there were, in fact, small releases of pesticides while Helena was operating the facilities. Moreover, the Helena "policy" did not pertain to the practices at the sites in the 1950s, 1960s, and in 1970, prior to Helena's presence there. The defendant carriers submitted evidence, however, that small, expected, routine releases of pesticides took place in the day-to-day processing of these pesticides at these sites throughout these earlier periods of use. The insurers are not disputing that if there were a spill of significance, that it might have been cleaned up (though Helena provided no evidence of such spills). Rather, the evidence offered by the carriers refers to the small releases of pesticides that were acknowledged by the witnesses to accompany operations.

Helena has taken the position that if it did not know what had taken place at the Fairfax facility before it started operations there, then any preexisting releases of pollutants could be "unexpected" by it. Specifically, Helena argued that

if it did not know that the landfill was there when it acquired the property, the landfill would be "unexpected" by Helena.[6]

Helena's argument is insufficient as a matter of law and somewhat misdirected as a matter of fact.

First, to clarify the issue as a factual matter, before 1970, all three sites were operated by Blue Chemical Company. The record shows that Helena entered into a formal merger with Blue Chemical Company in 1970, acquiring all of its assets and liabilities. As such, there does not seem to be any basis for Helena attempting to separate itself from the knowledge and practices of Blue Chemical, with which it merged. Mr. Blue was one of those who testified about the routine releases of small amounts of contaminants as part of the transfer of liquids at the sites. Moreover, with regard to the Fairfax facility, Blue Chemical purchased the business of Mitchell Insecticide in 1965. Helena would seem to be charged with the knowledge of all of its predecessors in interest. In addition, there was testimony of witnesses of continued routine discharges even after Helena took over.

Second, holding aside the factual problems with Helena's position, Helena is wrong legally. The pollution exclusion does not revolve around the particular policyholder's knowledge, but rather around whether the discharge was itself unexpected or accidental.

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[6] Helena's argument in this regard focused on dumping at the landfill. Much of the pollution at the site was not related to the landfill. The site had been operated in the 1950s and through the 1960s as a pesticide formulation facility. The evidence showed that operations released pesticides onto the soil.

For its theory that it is not responsible for intentional or expected pollution by its predecessor, unless Helena knew of the pollution by the predecessor, Helena has called this Court's attention to *Horry County v. Insurance Reserve Fund,* 2001 WL 137617 (S.Ct. Ct. App. Feb. 20, 2001). That case did not involve a pollution exclusion, but rather a different provision of the insurance policies which defines an "occurrence." That provision of the insurance policy, the occurrence definition, makes the issue whether the accident was "expected [or] intended from *the standpoint of the insured.*" The provision quoted in *Horry* states that an "occurrence" is:

> an accident, including continuous or repeated exposure to conditions, which result[s] in personal injury or property damage neither expected *no intended from the standpoint of the insured.*

Id. at *3. The *occurrence* definition thus makes the issue whether the occurrence was expected from the vantage point of the insured. If this Court had been asked to apply the "occurrence" definition of the insurance policy, which it has not, Helena's argument that the pollution was not expected from its standpoint because it took place at the site before it came there might have some relevance.[7]

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[7] Helena also tendered to the Court the opinion of an expert about how the pollution exclusion should be interpreted, arguing that prior intentional pollution could be an "accidental event in relation to the new owner." But Defendants called to my attention the fact that when the expert was asked in deposition about whether he was talking about the pollution exclusion or the occurrence definition, he stated that he was *not* referring to the pollution exclusion but was referring to the occurrence definition. Therefore,

That is not the case with the pollution exclusion, which is the provision of the insurance policy at issue here. The pollution exclusion asks whether the discharges were expected or accidental at all, not whether they were expected or accidental from the unique vantage point of the insured. The case law called to my attention by Defendants reflects the plain language of the policies on these points. *E.g., Powers Chemco Inc. v. Federal Ins. Co.*, 548 N.E.2d 1301, 1301 (N.Y. 1989); *Stamford Wallpaper Co., Inc. v. TIG Ins.*, 138 F.3d 75, 80 (2nd Cir. 1998). In *Powers Chemco*, the court rejected a policyholder's contention that since it was not the actual polluter, but merely inherited the problem from the prior landowner, the pollution exclusion clause could not bar its claim for cleanup costs. The court said: "Simply put, there is nothing in the language of the pollution exclusion clause to suggest that it is not applicable when liability is premised on the conduct of someone other than the insured." 548 N.E.2d at 1302. Similarly, in *Stamford Wallpaper*, the court rejected the argument that the pollution exclusion did not apply because another party did the dumping of wastes into a landfill, noting that the policies:

> clearly intended to exclude from coverage damages arising from the discharge of pollutants onto land, regardless of the nature of the discharge and regardless of whether the actual polluter was [the policyholder] or a third party, so long as the discharge was not 'sudden and accidental.'

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even if the Court were to consider the statement of an "expert" construing the unambiguous meaning of the insurance policy, the opinion presented by Helena was not addressed to the proper point.

138 F.3d at 80. For all of the above reasons, this Court grants Defendants' Motion for Summary Judgment Based on The Pollution Exclusion in the Insurance Policies.

III. THE CARRIERS ACTED IN GOOD FAITH IN CONTESTING THE COVERAGE

In addition to its claim for coverage, Helena has also made a bad faith claim and claim for punitive damages. Under South Carolina law, the existence of a reasonable basis for denying or withholding coverage precludes a bad-faith claim. *Crossley v. State Farm Mut. Auto Ins. Co.*, 415 S.E.2d 393, 397 (S.C. 1992). I have found above that there was a more than reasonable basis – a meritorious basis – for denying coverage on the two grounds discussed above. This is sufficient to dismiss the bad faith claim. In addition, I find that each of the additional grounds asserted for denying or withholding coverage – which I have not had a need to resolve – was at least "reasonable" as a matter of law and also would preclude the bad faith claim.

THEREFORE, for the foregoing reasons, it is ORDERED that Defendants' Motion for Summary Judgment on Helena's Claim for Reimbursement of Cleanup Expenses, Defendants' Motion for Summary Judgment Based on the Pollution Exclusion in the Insurance Policies and Motion for Summary Judgment on the Bad Faith and Punitive Damages Claim are GRANTED, and judgment shall be entered for Defendants accordingly.

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JACKSON V. GREGORY
CIRCUIT COURT JUDGE

Beaufort, South Carolina
This ____ day of _____, 2001

APPENDIX 2

IN THE COURT OF COMMON PLEAS
CASE NO. 90-CP-07-879

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

F.W. SCHEPER, III, Individually and as a Trustee in Dissolution for Blake and Johnson Company, BLAKE AND JOHNSON COMPANY, and ELSIE WHITE, Plaintiffs,	)
v.	)
UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant.	)

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the court on Defendant's Motion for Summary Judgment. This is an insurance coverage dispute. The insureds, F. W. Scheper, III and Elsie White, former officers, directors and employees of the Blake and Johnson Company, and the Blake and Johnson Company, a dissolved Connecticut corporation (collectively referred to as Plaintiffs or Blake and Johnson Company), seek a

declaratory judgment that United States Fidelity and Guaranty Company (USF&G), as insurer, has a duty to defend and indemnify Plaintiffs under general liability policies for environmental damage claims made against them by the United States Environmental Protection Agency (EPA). Summary Judgment is appropriate where the pleadings, discovery, and evidence submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56, S.C.R.Civ.P. For the reasons set forth below, I find that there is no coverage for these claims and order that summary judgment be granted in favor of the insurer.

This action was commenced on May 14, 1990, by the filing of the Summons and Complaint. The Complaint alleges that the Blake and Johnson Company was a Connecticut corporation which has been dissolved under the laws of Connecticut and South Carolina; that the company was engaged in the business of manufacturing and delivering metal fastening devices in Beaufort County; that USF&G issued general liability insurance policies to Blake and Johnson between 1967 and 1977; that while the policies were in effect, Blake and Johnson released chemical and metal effluents into the environment; and that on June 1, 1989, Blake and Johnson was notified by the EPA that it had conducted a removal action at the site under the authority of Section 104 of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9604, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99—499. The Complaint alleges that USF&G has a duty to defend the Plaintiff against the EPA's claim and a contractual obligation to pay any judgment that might be rendered in connection with the EPA claim. The Complaint seeks a declaration by the court fixing the rights and obligations of the parties.

The underlying facts forming the basis of the EPA claim against the Plaintiffs are contained in the EPA Record obtained by Plaintiffs' counsel through an FOIA Request. This EPA record was received by this court as evidence in conjunction with this Motion for Summary Judgment without objection from either party. The facts are essentially undisputed. The documents indicate that from 1969 to 1980 Blake and Johnson discharged approximately 33,000-75,000 gallons of wastewater containing hazardous material per day into an unlined lagoon; that EPA began investigating the site in 1981; and that EPA added the Blake and Johnson site in Beaufort County to the National Priorities List on September 21, 1984. EPA has conducted studies disclosing the release and threatened release of Hazardous substance into the environment, resulting in remedial action consisting mainly of excavation of contaminated soils and sediments; solidification/stabilization of soils and sediments; backfilling; return of treated soils and sediments; vegetative cover over treated material; monitoring and maintenance; and institutional controls. Following completion of these remedial procedures, the EPA notified potentially responsible parties, including the three Plaintiffs in this suit; other, former officers and directors of Blake and Johnson Company who now reside out-of-state; and the current occupants of the site, the Independent Nail Company, of their potential liability for cleanup costs in excess of 1.6 million dollars plus additional, undetermined administrative costs, attorney's fees and interest.

In its Answer, USF&G set up various defenses, including certain policy defenses. USF&G has denied issuing the policies, and Plaintiffs themselves have been unable to produce them. Because the Plaintiffs are entitled to all favorable inferences at this stage of the proceeding, and because there is some secondary evidence in the record that

USF&G issued policies to Blake and Johnson during the years in question, the policies are deemed to have been issued for purposes of this motion only. It is undisputed that USF&G issued only standard Comprehensive General Liability Policies (CGL policies) and Comprehensive Excess Indemnity Policies (Excess policies) during the years in question. USF&G has asked the court to grant summary judgment on the following grounds, among others:

1) That USF&G has neither coverage nor a duty to defend because the underlying claim for environmental cleanup costs incurred by the Environmental Protection Agency does not constitute covered "damage" under the policies at issue;

2) that there is neither coverage nor a duty to defend because the pollution did not occur within the policy periods; and that there is not duty to defend because there is no "suit" which triggers the Defendant's duty to defend.

MATERIALS REVIEWED

In addition to the EPA record, the court has received and reviewed the following materials:

1) The pleadings;

2) the written discovery, including Interrogatories and Answers to Interrogatories, Requests for Production and Responses to Requests for Production, and Requests for Admission and Responses to Requests for Admission;

3) briefs of both parties, including Defendant's Memorandum in Support of Motion for Summary Judgment, Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, and Defendant's Reply Memorandum;

4) depositions of Donald F. Anderson, F. W. Scheper, III, John S. Woods and Russell Lee Beer;

5) standard policy forms for the years in question, all of which were duly authenticated by the deposition testimony;

6) correspondence from the EPA to the Plaintiffs concerning the underlying claim, all of which was duly authenticated by Requests for Admission;

7) a USF&G Department Circular dated 10-6-70;

8) USF&G Temporary Notice number 70-9 dated May 26, 1970.

All of this material was submitted to the court for purposes of this motion without objection by either party. In addition, the court has reviewed a wealth of case law from South Carolina and other jurisdictions dealing with the issue of insurance coverage for pollution under the terms and conditions of insurance policies such as those involved in the instant case.

THE INSURANCE POLICIES

The parties have been unable to produce the actual insurance policies issued by USF&G to the Blake and Johnson Company for the years in question. Accordingly, the parties have relied upon standard policy forms issued by USF&G during the years in question. Three witnesses have knowledge of the policy forms issued by USF&G. Two of these witnesses were Plaintiffs' witnesses: John S. Woods, a retired insurance agent for Citizens Insurance Company of Beaufort, and Russell Lee Beer, a former USF&G underwriter who has been an insurance agent to Citizens Insurance Company of Beaufort since 1970. Woods and Beer were involved with the issuance of the policies from USF&G to Blake and Johnson Company, Woods on the policyholder's end and Beer on the carrier's end. The third witness is Donald F. Anderson, a claims supervisor for USF&G in its Environmental Claims Department. Mr. Anderson is familiar with the policy forms currently possessed by USF&G for the years in question. In their depositions, these three witnesses have identified the standard policy forms which would have been issued by USF&G to Blake and Johnson Company. The testimony indicates that these policy forms were created by Insurance Services Organization (ISO), of which USF&G is and was a member, and that USF&G affixes the company logo to the basic ISO forms.

Plaintiffs claim that USF&G issued an underlying CGL policy and an Excess policy to the Blake and Johnson Company. The Complaint alleges that these policies were issued between 1967 and 1977. For these years, USF&G issued CGL policies with edition dates of October 1966 and January 1973. The relevant language contained in the two CGL policies is substantially the same. In the coverage Part, they provide:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of

A. bodily injury or

B. property damage

to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if the allegations of the suit are groundless, false or fraudulent, and make such investigation and settlement of any claim or suit as it deems expedient. . . .

The standard Excess policies with edition dates of December 1967 and January 1973 provide, in relevant part:

INSURING AGREEMENTS

3.1 COVERAGE. The Company will indemnify the Insured for all sums which the Insured shall become obligated to pay as damages and expenses (all as defined herein and included within the term "ultimate net loss") by reason of liability imposed upon the Insured by law, or by contractual liability, because of

(1) personal injury or property damaged caused by, or

(2) advertising liability arising out of and occurrence which takes place anywhere.

The Excess policies do no contain the mandatory "duty to defend" provision as contained in the CGL policies. The Excess policies do provide:

5.3 INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT. The Insured shall be responsible for the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured which no underling insurer is obligated to defend.

5.4 DEFENSE; SETTLEMENT. When in the judgment of the Company an occurrence may involve damages in excess of the applicable underlying limit, the Company may elect at any time to participate with the Insured an with the underlying insurers in the investigation, settlement and defense of all claims and suits in connection therewith. After the exhaustion of any applicable limit of underlying insurance, the Company shall have the option to defend, at its own expense, any suit seeking to impose liability with respect to which insurance is afforded under this policy; and the Company may make such investigation and

settlement of any claim or suit as it deems expedient.

I. USF&G HAS NEITHER COVERAGE NOR A DUTY TO DEFEND BECAUSE CLEANUP COSTS INCURRED PURSUANT TO CERCLA DO NOT CONSTITUTE COVERED "DAMAGES" UNDER THE POLICIES.

As set forth above, coverage under the USF&G policies at issue in this action is limited in the Insuring clause to "all sums which the insured shall become legally obligated to pay as damages . . . because of . . . property damage caused by . . . an occurrence . . . ." (Emphasis added). Likewise, the Excess policies state that " 'damages' means all sums which the insured . . . becomes legally obligated to pay as damages . . . because of property damage . . . to which this policy applies." (Emphasis added).

The nature of the EPA claim is set forth in two notification letters sent by the EPA to the potentially responsible parties and the Close Out Report which is part of the material received pursuant to Plaintiffs' FOIA request and submitted without objection. The Close Out Report describes the remedial measures undertaken on page 6:

> The Operable Unit One Record of Decision (ROD) was signed on September 28, 1987 and outlined the following remedy for the soil contamination at the site:
>
> - Excavation of Contaminated soils and lagoon sediments.

- Solidification/stabilization of excavated soils and sediments.

- Backfilling of excavated lagoon sediments with a bottom layer of clean soil to two feet above the high water table.

- Return of treated soils and sediments to the lagoon at a level of approximately two feet above the high groundwater table.

- Vegetative cover of top soil and grass seed over treated material.

- Operation and Maintenance (O&M) activities of groundwater monitoring and maintenance of the vegetative cover.

- Institutional controls, such as fencing around the filled lagoon, and methods to ensure that future land uses are compatible with the selected remedy.

Construction activities at the size were initiated on March 28, 1988.

The remediation work was performed by an EPA ERCS contractor. EPA Region IV Emergency Response and Control Section personnel were responsible for design, oversight and monitoring of the work. Details

of the work are included in the OSC report for the site.

The Close Out Report further indicates that additional activities included clearing, sampling, dewatering, and debris disposal. Earlier activities included sampling and investigative procedures and the compiling of studies and reports, as set forth in another portion of the EPA record, the "First Operable Unit Remedial Investigation Report for Independent Nail Company Site Beaufort, South Carolina" dated June 8, 1987. On February 22 and March 1, 1990, EPA sent a letter to the Plaintiffs describing the activities for which EPA sought reimbursement:

> As a result of the release and threat of release presented to residents who were living in the area near the Site, in March, 1988, EPA began conducting a response which consisted of the removal and solidification of the hazardous waste from the lagoon.
>
> This response was undertaken pursuant to the authority of Section 104 of SERCLA, 42 U.S.C. Section 9601 et seq. The total response cost incurred to date by EPA in connection with the Site is approximately $1,693,130.87.
>
> Since Blake and Johnson were an owner/operator of the site during the time wastes were being placed in the lagoon, EPA hereby request that Blake and Johnson make restitution of costs incurred by the agency to date by payment of $1,693,130.08. EPA is currently tabulating additional response costs

> associated with the Site including, but not limited to, administrative costs, attorney's fees and interest. Therefore, EPA's total response costs are likely to increase.
>
> (Emphasis added).

The EPA claim does not include liability under 42 U.S.C. 9607(a)(4)(C) for "damages for injury to, destruction of, or loss of natural resource . . . ." (Emphasis added). Rather, the EPA seeks payment of response costs under 42. U.S.C. 9607(a)(4)(A)(B) incurred to remediate the site. Such claims seek equitable relief rather than damages. In South Carolina, response costs are not "damages" as set forth in the insurance policies at issue. Maryland Casualty Co. v. Armco, Inc., 822 F.2d. 1348 (4th Cir. 1979), cert. denied, 108 S. Ct. 703 (1988) (Maryland law) involved a suit brought by the United States against certain waste generators, including Armco, which alleged that improper maintenance techniques utilized in storing hazardous wastes resulted in the seepage of toxic chemicals into the soil and groundwater surrounding the site and surface flows off the site and onto adjoining property, thereby endangering persons and property. As in this case, the claim against Armco was brought pursuant to Section 107(a) of CERCLA seeking reimbursement for all investigatory and other response costs and enforcement activities related to the site and for the costs incurred or to be incurred in cleaning up the affected area. Applying Maryland law, the Fourth Circuit held that Armco was not entitled to coverage because the claim for injunctive and other equitable relief such as that south by the government under CERCLA does not constitute a claim for "damages" as defined in the policy's insuring agreement:

> The claim seeking compliance with the regulatory directive of a federal agency, which compliance takes the form of obedience to injunctions and reimbursement of remedial costs, does not constitute a claim for "damages" under the insurance policy.
>
> 882 F.2d at 1350.

In making it decision, the Fourth Circuit stressed the historical distinction recognized by the courts between "damages" on the one hand and "equitable relief" on the other. See, e.g., Aetna Casualty and Surety Co. v. Hanna, 224 F.2d at 503; Haines v. St. Paul Fire and Marine Ins. Co., 428 F. Supp. 435 (D.Md. 1977). In rejecting the policyholder's argument that the historical limitations applied by the courts to the term "damages" should be ignored, the Armco court observed that:

> It is a great step, and a dangerous one, for courts to begin to construe insurance policies to encompass costs of compliance with injunctive and reimbursement relief.
>
> 822 F.2d at 1353.

The Fourth Circuit also noted that its construction of the term "as damages" was consistent with the overall scheme of coverage set forth in the insuring agreement of the CGL policy. The insurer did not agree to pay "all sums which the insured shall become legally obligated to pay," but rather, "all sums which the insured shall become legally obligated to pay as damages":

> If the term "damages" is given . . . broad, boundless connotations . . . would become mere surplusage, because any obligations to pay would be covered. The limitation implied by employment of the phrase "to pay as damages" would be obliterated.
>
> 882 F.2d at 1352.

Finally, the Armco court observed that insurers have sound practical reasons for confining insurance coverage under liability policies to claims seeking legal "damages":

> Insurance policies, probably for reasons of certainty and economy, traditionally reimburse only damages arising from actual, tangible injury. Insurers are very reluctant to cover what are essentially prophylactic measures, such as safety precautions, for the obvious reason that such expenditures are subject to the discretion of the insured, and are not connected with any harm to specific third parties. Insurers require certainty as to the extent of their liability and this certainty is set forth in the insurance policy . . . .
>
> From an insurer's perspective, investigative and remedial actions taken by the government respecting potential environmental hazards constitutes a prophylactic measure. . . . . The government seeks to prevent or mitigate the occurrences or reoccurrences of hazardous contamination. The action is fundamentally prophylactic, and is not the sort that [insure] contracted to cover.

822 F.2d at 1353-1354.

The Fourth Circuit reaffirmed its Armco ruling in Cincinnati Ins. Co. v. Miliken and Co., 857 F.2 579 (4th Cir. 1988). Miliken was a case arising out of the United States District Court for the District of South Carolina in which the federal government had brought suit against generators of hazardous waste for recovery of cleanup costs pursuant to CERCLA Sections 9604 (a) and (b) and 9607 (a). The complaint alleged that waste had contaminated the soil and groundwater of a farm and that toxic compounds had been detected in neighboring wells. The prayer for relief was based on 42 U.S.C. Section 9607 (a)(1)-(4)(A) which empowers the government to sue for "all costs of removal or remedial action incurred by the Untied States." The waste generator was a CGL policyholder whose insuring clause was similar to that involved in this case. The Fourth Circuit held that although Armco and another case, Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986), had been decided under Maryland law, the result would be the same under South Carolina law:

> The meaning of Cincinnati's policy must be determined by application of South Carolina law. Nevertheless, the district court properly concluded that its decision should follow the reasoning of Armco and Mraz. We perceive no material distinctions between the South Carolina and Maryland laws in the construction and interpretation of insurance policies that should cause us to deviate from Armco and Mraz. Absent ambiguity, in South Carolina the language of an insurance policy is given its plain, ordinary, and popular meaning. (Citations omitted). Similarly, in Maryland

> words of an insurance contract are to be given their customary and normal meaning. (Citations omitted).
>
> In the insurance context the word "damages" is not ambiguous. It means legal damages. (Citations omitted). As a general rule comprehensive general liability policies do not extend coverage to claims for equitable relief. (Citations omitted). We have no doubt that South Carolina law, in concert with Maryland and Missouri, would recognize that a general comprehensive liability policy which obligated the insurer to pay "all sums which the insured shall become legally obligated to pay as damages" would not cover claims for which the insured is equitably obligated to pay.
>
> Although an insurance carrier's duty to defend is broader than the coverage it affords, for reasons adequately explained in Armco, 822 F.2d at 1264, Cincinnati was not obligated to defend the action brought by the Untied States.
>
> 857 F.2d at 980-981.

The Armco and Miliken decisions were cited with approval by the South Carolina Court of Appeals in Braswell, v. Faircloth, 387 S.E.2d 707 (Ct. App. 1989). There is substantial authority outside of South Carolina supporting the proposition that "damages" as set forth in the standard CGL policy do not encompass government ordered cleanup costs as well. Continental Inc. Co. v. Northeastern Pharmaceutical and Chemical Co., Inc., 842 F.2d 977 (8th Cir. 1988) (Missouri); A.J. Johnson and Co. v. Aetna Casualty and

Surety Co., 741 F. Supp. 298 (D.C. Mass. 1990) (Maine law); Verlan, Ltd. v. John L. Armitage and Co., 695 F. Supp. 950 (N.D. Ill. 1988) (Illinois); Hayes v. Maryland Casualty Co., 688 F. Supp. 513 (N.D. Fla. 1988) (Florida law).

This court is aware of decisions to the contrary. See, e.g., Spangler Const. v. Indus. Crankshaft, 388 S.E.2d 557 (N.C. 1990). However, in South Carolina, the unambiguous term "damages" in the USF&G policies does not encompass coverage for response costs asserted by EPA in its claim against the Plaintiffs. Therefore, USF&G has no obligation to defend or indemnify Plaintiffs in connection with the underlying claims in this case. Accordingly, the first basis of my decision granting summary judgment is that USF&G has neither coverage nor a duty to defend because cleanup costs incurred pursuant to CERCLA do not constitute covered "damages" under the policies at issue.

II. THE POLLUTION DID NOT OCCUR WITH THE POLICY PERIOD.

All of the policies at issue in this case require for coverage that property damage result during the policy period from an occurrence. The Coverage Parts for 1966 and 1973 CGL policies are similar:

> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of property damage to which this insurance applies, caused by an occurrence . . . .

The 1966 CGL policy contains the following definition of "occurrence":

"occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neigher expected nor intended from the standpoint of the Insured.

(Emphasis added).

The 1973 CGL policy contains the follwing definition of "property damage":

"property damage" means:

(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom.

(Emphasis added).

The 1967 Excess policy contains the following definition of "occurrence":

"occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in personal injury or property damage neither expected nor intended from the standpoint of the Insured . .

(Emphasis added).

The 1973 excess policy contains the following definition of "property damage":

"Property damage: means:

(1) Physical injury to or destruction of tangible property which occurs during the policy period . . . .

(Emphasis added).

In hazardous waste cases in South Carolina, an occurrence is judged by which the injuries are first manifested. In Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986), the Fourth Circuit held that, under Maryland law, in hazardous waste burial cases, "an occurrence is deemed to take place when the injuries first manifest themselves." Mraz at page 1328. The court stated:

> The general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged . . . . Often, these cases involve a wrongful act that produces no harm for a period of time and then suddenly manifests itself in a burst of damage . . . . There are situations, however, in which the existence or scope of damage remains concealed or uncertain for a period of time even though damage is occurring. The leakage of hazardous wastes as in this case is a clear example. Determining exactly when damage begins can be difficult, if not impossible. In such cases, we believe that the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves. . . .

804 F.2d at 1328.

Mraz applies in South Carolina pollution cases as well. Safeco Ins. Co. of America v. Mutual Inc. Co., No. 89-2822 (4th Cir. 1990) (affirming Judge Perry); Cincinnati Milliken and Co., supra.

Although Plaintiffs argue that contamination was discovered in 1975, the evidence indicates that the injuries were not manifested until after the USF&G policies expired in 1977. F.W. Scheper, III was employed by Blake and Johnson from 1975-1980 and served on its Board of Directors from 1976-1980. In his deposition, he testified that the company was small enough that he would have had knowledge of any environmental problems at the plant and that he was unaware of any pollution problems until 1980 when the company was about to be sold. The first hint of a contamination problem came in a letter from DHEC dated April 4, 1980. However, Mr. Scheper produced two letters from DHEC from June 1980 in which DHEC stated that groundwater evaluation yielded "favorable results," showing no lead in the groundwater and chromium at approximately the concentration of the drinking water standard with "little likelihood of finding serious contamination of groundwater". Basically, these letters gave Blake and Johnson a clean bill of health, and, accordingly, Blake and Johnson proceeded to sell the plant to Independent Nail. Furthermore, Mr. Scheper testified that Blake and Johnson had no contact with the EPA whatsoever until the company was dissolved in 1981. The Close Out Report (p. 3) confirms that EPA did not become involved at the site until February 26, 1981, at which time a "Potential Hazardous Waste Site Investigation Report and Preliminary Assessment Report" was prepared. That is when the injuries were manifested; that is when there was an occurrence. Therefore, USF&G is granted summary judgment on the ground that the pollution did not occur within the policy period.

II. THERE IS NO "SUIT" WHICH TRIGGERS USF&G'S DUTY TO DEFEND.

An additional ground for ruling that there is no duty to defend in this case is the fact that there is not suit to defend. The Excess policies create no duty to defend on the part of the insurer; consequently, any duty to defend must arise under the terms of the CGL policies. As noted above in the discussion of the insurance policies, the CGL policies require the insurer to defend any "suit" against the insured. In this case, Mr. Scheper has testified that no lawsuit has been filed by the EPA, nor has the EPA issued any administrative orders directed at the Plaintiffs, and that the extent of the EPA's notification is limited to correspondence to the Plaintiffs from the EPA. This correspondence is neither a suit nor an administrative order. The letters from EPA to the Plaintiffs provide that:

> Since Blake and Johnson were an owner/operator of the site during the time wastes were being placed in the lagoon, EPA hereby requests that Blake and Johnson make restitution . . . . EPA is currently tabulating additional response costs associated with the Site including, but not limited to, the administrative cost, attorney's fees and interest. Therefore EPA's total response cost. Should Blake and Johnson, as the responsible party want to discuss it s liability with the EPA, please contact the person named below in writing not later than fifteen (15) days after receipt of this letter. Absent such contract, the Agency will assume that 'Blake and Johnson have declined to reimburse the Fund for the

> Site expenditures, and may file suit in federal court to recover its response costs.
>
> (Emphasis added).

The relief requested in Plaintiff's Complaint includes a demand for defense of the EPA's "claim" (Complaint paragraph 7 and prayer for relief). However, the policy provides for defense of a "suit," and there is no "suit" to defend. It is firmly established under South Carolina law that general rules of contract construction apply equally to insurance policies. Gambrell v. Travelers Ins. Cos., 310 S.E.2d 814 (1983); Sloan Construction Co. v. Central Nat'l. Ins. Co. of Omaha, 236 S.E.2d 818 (1977); Thompson v. Continental Inc. Cos., 351 S.E.2d 904 (Ct. App. 1986). Where the policy language in the contract of insurance is plain and unambiguous, the court must give effect to that language. Torrington Co. v. Aetna Casualty and Surety Co., 216 S.E.2d 547 (1975). Policy language must be given a plain, ordinary, and popular meaning. Braswell v. Faircloth, 387 S.E.2d 707 (1989). Policy language should not be tortured in order to extend or defeat insurance coverage that was never intended by the parties. Gambrell v. Travelers Ins. Cos., supra. In South Carolina, there is no duty to defend absent a lawsuit:

> Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play there must be an external event within the coverage of the policy and the performance of all conditions percendent by the insured, including his cooperation. There is no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained.

Howard v. Allen, 176 S.E.2d 127, 129 (1970).

(Emphasis added).

Courts from other jurisdictions which have considered this question have held that claims and demands by governmental agencies are not "suits" within the meaning of insurance policies, and therefore do not trigger an insurer's duty to defend. Ryan, Klimek, Ryan Partnership v. Royal Insurance Company, 728 F. Supp. 862 (D.R.I. 1990) (New York law); Arco v. Traveler Insurance Company, 730 F. Supp. 59 (W.D. Mich. 1989; Harter Corp. v. Home Indemnity Co., 713 F. Supp. 213 (W.D. Mich. 1989); Aetna Casualty and Surety Co. v. Gulf Resources and Chemical Corp., 709 F. Supp. 958 (D.C. Idaho 1989).

The plain language of the policy and decisional authority of this state and other jurisdictions require that a suit be filed before an insurer's duty to defend its insured arises. Because the demands made by the EPA are not equivalent to the filing of a suit, USF&G has no contractual duty to defend the Plaintiffs in this case. Therefore, I grant summary judgment in favor of USF&G on the duty to defend issue on the additional ground that USF&G has no duty to defend the Plaintiffs at this time because there is no contractual duty to defend at this point without an EPA suit. It is, therefore,

Ordered that summary judgment is granted in favor of the Defendant, United States Fidelity and Guaranty Company, on the following grounds:

1. USF&G has neither coverage nor a duty to defend because cleanup costs incurred pursuant to CERCLS do not constitute covered "damages" under the policies;

2. USF&G has neither coverage nor a duty to defend because the pollution did not occur within the policy period;

3 USF&G has no duty to defend because there is not "suit" which has been filed which triggers USF&G's duty to defend.

AND IT IS SO ORDERED!

_____

THOMAS KEMMERLIN, JR.
SPECIAL CIRCUIT COURT JUDGE

Beaufort, South Carolina

This _____ day of _____, 1991.